Supreme Court, U.S.
FILED
MAY 1 1997
OFFICE OF THE CLERK

No. 96-1562

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

SAMANTHA SISTRUNK,

Petitioner,

v.

CITY OF STRONGSVILLE, OHIO and
THE BUSH-QUAYLE '92 GENERAL COMMITTEE, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF IN OPPOSITION OF RESPONDENT BUSH-QUAYLE '92 GENERAL COMMITTEE, INC.

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May 1, 1997

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QUESTION PRESENTED

Did the United States Court of Appeals for the Sixth Circuit properly apply this Court's decision in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 115 S. Ct. 2338 (1995), in affirming the dismissal of petitioner's claim that respondent Bush-Quayle '92 General Committee, a private entity, violated her right to free speech by requiring her to relinquish her "Clinton for President" button as a condition of admittance to the Committee's political rally?

RULE 29.6 NOTATION

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed appear in the caption. There is no parent or subsidiary company of any party to be listed.

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Bush-Quayle '92 General Committee, Inc. ("the Committee") respectfully submits that the Court should deny the petition for a writ of certiorari.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App., A1-A17) is reported at 99 F.3d 194. The relevant orders of the district court (Pet. App., D1-D13; F1-F13) are not reported.

JURISDICTION

The court of appeals entered its judgment on October 29, 1996 (Pet. App., A1). The court of appeals denied a petition for rehearing and rejected a suggestion for rehearing *en banc* on January 2, 1997 (*id.*, G1-G2). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

After obtaining a permit from the City of Strongsville, Ohio, respondent Bush-Quayle '92 General Committee, Inc., a "private campaign committee" (Pet., i), held a political rally in the City Commons on October 28, 1992, in support of then-President George Bush's re-election campaign. Pet. App., A2-A3. Petitioner Samantha Sistrunk gained admittance to the rally after voluntarily relinquishing, upon request from a campaign worker tending the gate, her "Clinton for President" button. *Id.*, A3. Although petitioner had never applied for a permit to use the Commons (*id.*, A9), she brought suit under 42 U.S.C. § 1983 alleging that the Committee and the City had violated her First Amendment right to free speech by preventing her from using the rally "to express her support for then-presidential candidate Bill

Clinton." Compl. ¶ 20, 1. Now she seeks a writ of certiorari to the Sixth Circuit, which affirmed the district court's dismissal of her claims.

Petitioner filed her original complaint on April 11, 1994. Based upon the Committee's alleged requirement that she relinquish her Clinton for President button before entering the rally, she alleged that the Committee and, by its acquiescence, the City, had violated her rights to freedom of speech under the United States and Ohio Constitutions. *See id.*, ¶¶ 23-30.

On August 19, 1994, the district court dismissed petitioner's claims against the Committee for insufficient allegations of state action. Pet. App., D1-D13.[1/] One month later, petitioner moved for leave to amend her complaint, and on October 12, 1994, the district court granted that motion. *Id.*, E1-E3. On the following day, however, another judge of the same district court granted a motion by the Committee to dismiss a similar suit against the Committee arising out of the same political rally. *Schwitzgebel v. City of Strongsville*, No. 1:94-CV-757 (N.D. Ohio Oct. 13, 1994) (unpublished). Citing that decision and other authority, the Committee moved on November 1, 1994, to dismiss petitioner's amended complaint on the ground that her new allegations still failed to support a finding of state action by the Committee. Again, the district court agreed, and on December 15, 1994, it granted the Committee's motion to dismiss, as well as a similarly dispositive motion by the City. Pet. App., F1-F11.

[1/] In an apparent clerical error, the district court initially dismissed petitioner's complaint on June 27, 1994, before petitioner had responded to the Committee's motion to dismiss. Pet. App., B1-B2. The district court promptly vacated that order. Pet. App., C1-C2. It then considered petitioner's response and dismissed her complaint again on August 19, 1994. Pet. App., D1-D13.

Petitioner thereafter appealed. During the pendency of her appeal, this Court issued its unanimous decision in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 115 S. Ct. 2338 (1995). The Committee promptly advised the court of appeals of this intervening decision, and it was discussed extensively during oral argument. On October 29, 1996, the court of appeals affirmed the district court's judgment. Pet. App. A1-A17.

Relying on *Hurley*, the court of appeals held that petitioner had failed to allege "a violation of her free speech rights," by either the Committee or the City, even if the Committee had engaged in state action. *Id.*, A2. As a threshold matter, the court noted that First Amendment law "does not prohibit the city from issuing permits to groups seeking to make exclusive use of the Commons for expressive activity during a limited period of time." *Id.*, A7. Further, it explained:

> [Petitioner] has not alleged any content-based exclusion in the permit application process; that is, [petitioner] did not allege that she applied for permission to hold a rally for her own expressive purposes in the Commons and was denied permission on the basis of the content of her views. [Petitioner's] only claim is that she was not permitted to participate *in the Committee's speech* while expressing her own discordant views. To require that the organizers [of the rally] include buttons and signs for Bill Clinton in the demonstration would alter the message the organizers sent to the media and other observers, even if the holders of signs and wearers of buttons did not otherwise interfere with the pro-Bush rally. Just as the organizers of the parade [at issue in *Hurley*] could not be compelled to include in their message the discordant message of [the respondent group in that case], the committee that organized the rally for

> George Bush could not be compelled to include in its message an expression of confidence in Clinton.

Pet. App., A9. The Court thus concluded that the reasoning of *Hurley* defeated petitioner's claim. Senior District Judge Spiegel, sitting by designation, dissented. Pet. App., A12-A17. A petition for rehearing and suggestion of rehearing en banc were denied on January 2, 1997.

Meanwhile, a unanimous panel of the Sixth Circuit affirmed dismissal of the other Section 1983 suit that arose out of the same rally. *Schwitzgebel v. City of Strongsville*, 97 F.3d 1452 (6th Cir. 1996) (*mem.*).

REASONS FOR DENYING THE PETITION

I. The Court of Appeals Properly Followed *Hurley*.

Petitioner has misconstrued the decision below and has framed a question that this case does not present. The court of appeals did not hold and the record does not suggest that the Committee was allowed to "impose a viewpoint-based restraint on . . . peaceful expressive activity . . . in a public park." Pet., i. On the contrary, it held that petitioner, as a participant in the Committee's rally, did not have a right to impose *her* "discordant views" *upon the Committee* within the confines of the Committee's expressive event. Pet. App., A9.

This holding properly follows *Hurley*. In *Hurley*, this Court unanimously held that the First Amendment prohibits the government from compelling the organizers of an expressive event to include within their event opinions with which the organizers disagree. *See* 115 S. Ct. at 2347-51. It is equally true, as the court of appeals held, that the Committee could not be required to include, within its rally for then-President Bush, petitioner's expression of support for

then-Governor Clinton. Pet. App., A7-A11.

Petitioner seeks to avoid this result by arguing that "[n]either *Hurley* nor any other decision of this Court gives a speaker the right to control the content of a *spectator's* expressive activity in a public forum." Pet., 11-12; *see also* Pet. App., A13-A17 (Spiegel, D.J., dissenting) (advancing same argument). Petitioner urges that she "merely tried to observe the Committee's message and *express dissent* as a member of the audience." Pet., 12 (emphasis added). This argument fails for two reasons.

First, petitioner has not alleged a violation of her right to observe; she has alleged a violation of her right to speak. Her petition concedes that "[w]hat petitioner sought to do here was . . . express her own distinct message of opposition." Pet., 15. Her complaint alleges that she "chose to attend" the rally "to express her support for then-presidential candidate Bill Clinton." Compl. ¶¶ 20, 1. She is, after all, alleging that she was deprived of her First Amendment right *to speak*.

Second, petitioner has not alleged that she was denied the right to speak on the sidewalks or streets outside the Committee's rally, or that she was denied a permit to use the public commons on another day. *See* Pet. App., A9-A10 (so noting).[2/] Rather, like the marchers in *Hurley*, her complaint

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[2/] *Cf. Heffron v. International Soc'y for Krishna Consciousness*, 452 U.S. 640, 647, 649-56 (1981) (even in public forums, "the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired;" so long as nothing prevented claimants from conveying their message to the public in the surrounding streets and sidewalks, they could claim no constitutional injury); *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972) ("two parades cannot march on the same street simultaneously, and government may allow only one").

rests on an asserted right to express her discordant views during the rally as a "rally participant." Am. Compl., ¶¶ 2, 4, 16-18; *see also* Pet. App., A9. As the court of appeals correctly held, *Hurley* rejects petitioner's alleged right to state her opposing views within the Committee's rally. Pet. App., A9 (citing *Hurley*).[3/]

II. Petitioner Has Not Alleged and Cannot Allege Legally Sufficient State Action.

Although allowed to amend her complaint to bolster her allegations of state action, petitioner has failed to make a legally sufficient allegation of that element. This failure is an alternative basis for denying the petition.

Petitioner has conceded throughout this case and in her petition that the Committee is a "private campaign committee." Pet, i. This Court has repeatedly held that allegations of state action will suffice to support a constitutional claim only if the actions of the state are directly responsible for the allegedly wrongful conduct. *See, e.g., Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619 (1991) (one purpose of the state action requirement is to avoid "'imposing on the State, its agencies or officials, responsibility

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[3/] Petitioner asserts that "the Committee's message came from the podium, not the audience." Pet., 13. As the court of appeals noted, however, a rally (like a parade) seeks to make a collective point, and the message conveyed by each "rally participant" is part of that collective point. Pet. App., A9. Petitioner's amended complaint implicitly acknowledged this fact. Am. Compl., ¶¶ 16-18. The Committee's "rally" was, in the common usage of that term, an effort to "stir up," to "arouse group enthusiasm," and to "summon for a common purpose" the "supporters or followers" of a "common cause" -- the re-election of George Bush. *Webster's Third New Int'l Dictionary* 1878 (1993) (defining "rally").

for conduct for which they cannot fairly be blamed'") (citation omitted); *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (the fact that the state closely regulated, licensed, and provided over 90% of a nursing home's funding did not make the home's actions state action; "[t]he purpose of the [state action] requirement is to assure that constitutional standards are involved only when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains") (underlining added). *Rendell-Baker v. Kohn*, 457 U.S. 830, 839-43 (1982) (same, in the case of a school for troubled children).

Petitioner has never claimed that the *City* caused or was directly responsible for the Committee's alleged violation of her rights: the confiscation of her lapel button. The City's provision of a permit to use the Commons, its transportation of school children to the rally in buses, and the appearance of its mayor at the rally to endorse President Bush's candidacy are all wholly unrelated to the confiscation of petitioner's button.

III. There Is No Conflict in the Lower Courts.

Petitioner asserts that the decision below "conflicts with" the D.C. Circuit's recent decision in *Mahoney v. Babbitt,* 105 F.3d 1452 (D.C. Cir. 1997), and that there is an "urgent need" for guidance from this Court regarding the proper meaning of *Hurley*. Pet., 9, 7. This assertion is not correct.

In *Mahoney*, the D.C. Circuit held that the United States government, acting through the National Park Service ("NPS"), could not base decisions regarding permits to demonstrate along the route of the President's Inaugural Parade on the content of the applicant's speech. 105 F.3d at 1455-60. The D.C. Circuit itself noted that "the *Hurley* decision has little to do with the [*Mahoney*] case." *Id.* at 1456.

Specifically, the D.C. Circuit noted "two distinctions between *Hurley* and [*Mahoney*] which are so critical as to make the cases not remotely parallel.' *Id.* "In the first place, the organizer of the parade in *Hurley*"—like the Committee here—"was a private group exercising its own First Amendment rights." *Id.* By contrast, "in [*Mahoney*], NPS is the government." *Id.* Second, and perhaps more important:

> [T]he Supreme Court's holding in *Hurley* was that the organizers of a parade could not be compelled to include other demonstrators in their event. The protesting demonstrators in *Hurley* sought to compel the private organizers to allow their participation in the parade. Mahoney and his co-plaintiffs do not seek compulsion or even permission to participate in the Inaugural Parade organized by the Inaugural Committees and other supporters of President Clinton. All they seek is the First Amendment-protected right to stand on the sidewalk and peacefully note their dissent as the parade goes by.

Id. Here, like the *Hurley* claimants and unlike the *Mahoney* plaintiffs, petitioner was not content "to stand on the sidewalk" and express her views from that side of the rope. Rather, she seeks the aid of the government, through this Court, to force the Committee to include her speech within the Committee's rally. As shown (pp. 4-6 above), *Hurley* repudiates this claim; the D.C. Circuit's decision in *Mahoney* is not to the contrary.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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